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COURT OF APPEALS
DIVISION TWO

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

COBBLESTONE ROAD HOUSE, LLC,)	2 CA-CV 2007-0092
an Arizona limited liability company,)	DEPARTMENT A
)	
Plaintiff/Appellant/Cross-Appellee,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
v.)	Rule 28, Rules of Civil
)	Appellate Procedure
CARL GREER and PATRICIA GREER,)	
husband and wife,)	
)	
Defendants/Appellees/Cross-Appellants.)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20063642

Honorable John F. Kelly, Judge

AFFIRMED

McNamara, Goldsmith, Jackson & Macdonald, P.C.
By Eugene N. Goldsmith

Tucson

and

William E. Druke

Tucson
Attorneys for Plaintiff/Appellant/
Cross-Appellee

H O W A R D, Presiding Judge.

¶1 Appellant Cobblestone Road House, LLC, appeals from a summary judgment entered in favor of appellees Carl and Patricia Greer on statute of limitations grounds. Cobblestone contends the trial court erred in concluding that the discovery rule applied to Cobblestone’s action for breach of a covenant. Finding no reversible error, we affirm.

Factual and Procedural Background

¶2 Although the relevant facts are undisputed, we view them in the light most favorable to Cobblestone, the nonmoving party. *See Ledvina v. Cerasani*, 213 Ariz. 569, ¶ 2, 146 P.3d 70, 71 (App. 2006). Cobblestone and the Greers own adjacent lots in a residential subdivision. Cobblestone leases its property to Gregory and Patricia Moore. All lots in the subdivision are subject to recorded Covenants, Conditions, and Restrictions (CC&Rs).

¶3 The CC&Rs require plans for “improvements” on any lot to be approved by an architectural committee. The plans must meet certain criteria, including a fifteen-foot height restriction on improvements. Improvements include “landscaping.” Finally, lot owners are required to maintain their improvements in accordance with the plans. Because four palm trees on the Greers’ property presently exceed fifteen feet in height, they violate the CC&Rs.

¶4 Cobblestone sued the Greers over the palm trees, alleging nuisance and breach of the CC&Rs and seeking injunctive relief.¹ The Greers asserted various defenses, including that Cobblestone’s claim was barred by the statute of limitations. The parties filed cross-motions for summary judgment, in which they disputed when the cause of action accrued. The trial court ruled that, under the discovery rule, it accrued when Cobblestone knew or reasonably should have known of the violation. The court also found a factual question remained regarding when accrual had occurred. Cobblestone subsequently conceded that it knew or reasonably should have known of the violation more than six years before filing this action.² The court then entered judgment in favor of the Greers, from which Cobblestone has appealed.³

Statute of Limitations and Accrual

¶5 Preliminarily, although the parties agreed below that the six-year limitation in A.R.S. § 12-548 applies to this action, the Greers now contend that the four-year limitation in A.R.S. § 12-550 applies. But the issue of when the cause of action accrued is unaffected by which statute of limitations applies because Cobblestone admitted it knew or should have

¹Cobblestone subsequently withdrew its nuisance claim.

²Cobblestone treats the Moores as its agents for purposes of notice.

³The Greers also filed a notice of cross-appeal, but this was unnecessary because they do not ask us to modify the judgment in a way that expands their rights or lessens Cobblestone’s. *See* Ariz. R. Civ. App. P. 13(b)(3). Moreover, we fail to see how the Greers were aggrieved by the judgment in their favor. *See* Ariz. R. Civ. App. P. 1 (“An appeal may be taken by any party aggrieved by the judgment.”).

known of the violation six years before it sued. If Cobblestone is correct in either of its contentions on appeal—that the violation constituted a continuing violation or that the cause of action accrued upon demand for compliance—the action would have been timely under either statute. Accordingly, we need not decide which statute of limitations applies in this case. *See Vales v. Kings Hill Condo. Ass’n*, 211 Ariz. 561, ¶ 17, 125 P.3d 381, 386-87 (App. 2005) (noting breach-of-contract claim based on covenant timely under either § 12-548 or § 12-550).

¶6 Cobblestone argues the trial court erred by concluding that its cause of action for breach of the CC&Rs accrued when it knew or reasonably should have known of the violation.⁴ Because there are no disputed facts regarding accrual, this is a question of law that we review de novo. *See Montañó v. Browning*, 202 Ariz. 544, ¶ 4, 48 P.3d 494, 496 (App. 2002).

¶7 Generally, a cause of action accrues when one party may sue another. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995). To determine when a cause of action accrues, we analyze the elements of the claim. *Glaze v. Larsen*, 207 Ariz. 26, ¶ 10, 83 P.3d 26, 29 (2004). The essence of Cobblestone’s claim is that the Greers breached the CC&Rs, which constitute a contract. *See Powell v. Washburn*, 211 Ariz. 553, ¶ 8, 125 P.3d 373, 375 (2006); *see also* Restatement (Third) of

⁴At oral argument, Cobblestone claimed this court did not need to address the discovery rule. But the trial court expressly applied the discovery rule and Cobblestone argued in its brief that the court erred by doing so. Therefore, we choose to address it.

Property: Servitudes § 4.1 cmt. d (2000) (contract principles apply to expressly created servitudes). Our supreme court has held that the discovery rule can apply in breach of contract actions, unless the breach was open and obvious. *Gust, Rosenfeld*, 182 Ariz. at 589-90, 898 P.2d at 967-68; *see also HSL Linda Gardens Props., Ltd. v. Freeman*, 176 Ariz. 206, 207, 859 P.2d 1339, 1340 (App. 1993) (applying discovery rule in action for breach of covenants of title and freedom from encumbrances). “Under the discovery rule . . . a cause of action does not accrue until the plaintiff knows or with reasonable diligence should know the facts underlying the cause.” *Doe v. Roe*, 191 Ariz. 313, ¶ 29, 955 P.2d 951, 960 (1998). Accordingly, the trial court could properly apply the discovery rule to an action for breach of the CC&Rs.

¶8 Citing *Gust, Rosenfeld*, Cobblestone argues that application of the discovery rule is inappropriate in this case because the injury was open and obvious. But the discovery rule extends the statute of limitations to Cobblestone’s benefit. *See Gust, Rosenfeld*, 182 Ariz. at 588, 898 P.2d at 966. If it does not apply, the statute of limitations began to run on the date the palm trees exceeded fifteen feet in height, and Cobblestone could have sued the Greers then. And Cobblestone concedes it knew or should have known the trees exceeded fifteen feet more than six years before it filed this action. Cobblestone’s argument, if accepted, would not help it. Therefore, the trial court correctly found that, under the discovery rule, Cobblestone’s action is barred.

¶9 Cobblestone contends, however, that the discovery rule does not govern its action because the violation is a continuing one and a new cause of action accrues each day the violation exists or upon its demand that the Greers correct the violation. In support of its argument, it cites Arizona nuisance and trespass cases in which the courts have found a cause of action not barred although the otherwise applicable statute of limitations had run since the first violation occurred. *See City of Tucson v. Apache Motors*, 74 Ariz. 98, 106, 245 P.2d 255, 260 (1952) (statute of limitation for temporary or continuing nuisance accrues on date of successive injury); *Garcia v. Sumrall*, 58 Ariz. 526, 532-33, 121 P.2d 640, 643 (1942) (continuing trespass by cattle); *Henshaw v. Salt River Valley Canal Co.*, 9 Ariz. 418, 420-21, 84 P. 908, 909-10 (Terr. 1906) (failure to furnish shareholders with ongoing water supply).

¶10 But nuisance and trespass theories apply to protect interests different than contract law and do not require a court to find and enforce the intention of the contracting parties. *Compare Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 4, 712 P.2d 914, 917 (1985) (private nuisance a nontrespassory interference with enjoyment of property), *and MacNeil v. Perkins*, 84 Ariz. 74, 82, 324 P.2d 211, 216 (1958) (trespass involves “injury of the person or property of another”), *quoting* 87 C.J.S. *Trespass* § 1, *with Powell*, 211 Ariz. 553, ¶ 14, 125 P.3d at 377 (restrictive covenant interpreted to give effect to parties’ intent), *and* Restatement § 4.1 (same), *and United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, ¶ 20, 128 P.3d 756, 761 (App. 2006) (implied covenant of good

faith and fair dealing protects reasonable expectation of parties). Nuisance and trespass cases therefore are unhelpful to Cobblestone.

¶11 Cobblestone also cites a number of out-of-state covenant cases in which the courts have applied different accrual rules. In some cases, courts have found that the contract language supported a cause of action that accrues anew each day or with each new breach. *See Atlanta, Knoxville & N. Ry. Co. v. McKinney*, 53 S.E. 701, 704 (Ga. 1906) (covenant required delivery of “sufficient water” for plaintiff’s “ample use and accommodation”); *Flege v. Covington & Cincinnati Elevated Ry. & Transfer & Bridge Co.*, 91 S.W. 738, 738-39 (Ky. 1906) (covenant to maintain and renew stone wall); *Diefenthal v. Longue Vue Mgmt. Corp.*, 561 So. 2d 44, 55 (La. 1990) (frequent social events violating covenants); *Carnegie Realty Co. v. Carolina, Clinchfield & Ohio Ry. Co.*, 189 S.W. 371, 373 (Tenn. 1916) (covenant to build train depot and operate it “forever”); *Barker v. Jeremiasen*, 676 P.2d 1259, 1261 (Colo. Ct. App. 1984) (“repeated and successive breaches” of covenant). In others, the courts have found the contract language supported a cause of action that accrues once there is a demand for performance. *See Cutujian v. Benedict Hills Estates Ass’n*, 49 Cal. Rptr. 2d 166, 173 (Ct. App. 1996) (covenant requiring association to maintain “natural and manmade slopes and corresponding drainage ditches” on plaintiff’s property); *Louisville & Nashville R.R. Co. v. Pierce*, 230 S.W.2d 430, 434 (Ky. 1950) (covenant to construct two passways with no apparent deadline); *Scherpenseel v. Bitney*, 865 P.2d 1145, 1150 (Mont. 1993) (covenant to dedicate portions of property “in the future”); *Parks v. Hines*, 68 S.W.2d 364,

367-68 (Tex. Civ. App. 1934), *aff'd*, 96 S.W.2d 970 (Tex. Comm'n App. 1936) (performance of covenant to extend water lines "to be made upon demand").

¶12 Each of these cases is based on the particular wording of the covenant breached. In fact, the holdings in two of these cases have been expressly limited to open-ended covenants. *See Crestmar Owners Ass'n v. Stapakis*, 69 Cal. Rptr. 3d 231, 233-34 (Ct. App. 2007) (distinguishing *Cutujian*); *Country Estates Homeowners Ass'n v. McMillan*, 915 P.2d 806, 808 (Mont. 1996) (distinguishing *Scherpenseel*). Accordingly, although some covenants may be susceptible to a continuing breach or a breach that accrues on demand, not all will.

¶13 In this case, the covenant allegedly breached, Art. IV, Sec. 3, provides in relevant part as follows: "[A]ll plans must meet the following minimum criteria . . . : (i) No improvement shall exceed one story in height or fifteen (15) feet above finished floor elevation."⁵ This covenant, if breached at all, was breached upon submission of the plans.

¶14 Cobblestone also argues, however, that the fifteen-foot limit stands alone, apart from the plan provision. But in interpreting restrictive covenants, we place "heavy emphasis . . . on the written expression[] of the parties' intent," Restatement § 4.1 cmt. d, and the plain language of Art. IV, Sec. 3 does not say that the fifteen-foot limit stands alone. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983) (in

⁵The parties debate whether this is an affirmative or a negative covenant. But rather than imposing a label on the provision, we must ascertain and give effect to the parties' intent. *See Powell*, 211 Ariz. 553, ¶ 14, 125 P.3d at 377.

interpreting contract, courts look to plain meaning of words in context of whole agreement). Cobblestone has not identified anything in the record suggesting Art. IV, Sec. 3 must be interpreted that way based on the circumstances surrounding its creation or to effectuate its purpose. *See Powell*, 211 Ariz. 553, ¶¶ 13-14, 125 P.3d at 376-77; Restatement § 4.1, cmt. d (parties' intention "is ascertained from the servitude's language interpreted in light of all the circumstances"). Even if this provision did stand alone, Cobblestone stipulated that it knew the trees had exceeded the fifteen-foot limitation more than six years before it sued the Greers. And the Greers have not taken any additional action since that violation. Therefore, the cause of action accrued at that time and the statute of limitations would have expired before Cobblestone commenced this action.

¶15 Cobblestone contended at oral argument, however, that Art. IV, Sec. 3(i) contains an implied covenant that the trees would be maintained below fifteen feet in height. Again, the plain language of the restrictions on plans does not give rise to such an implication. *See United Cal. Bank*, 140 Ariz. at 259, 681 P.2d at 411. More importantly, the CC&Rs have another provision that specifically deals with the ongoing maintenance issue. Art. V, Sec. 6(g) states: "All improvements shall be maintained in accordance with the original plans submitted and approved by the Architectural Control Committee." This provision, not Art. IV, Sec. 3, governs ongoing compliance with the fifteen-foot height limitation. "[W]e must interpret a contract in a way that gives meaning to all its material terms and renders none superfluous." *Miller v. Hehlen*, 209 Ariz. 462, ¶ 11, 104 P.3d 193,

197 (App. 2005). If we engraft into Art. IV, Sec. 3 a requirement that improvements be maintained in accordance with the plans, we render Art. V, Sec. 6(g) meaningless. Therefore, we cannot find that the parties intended Art. IV, Sec. 3(i) to impose an ongoing maintenance requirement. *See id.*

¶16 We conclude that the parties to the CC&Rs intended that Art. IV, Sec. 3 govern plan approval and that Art. V, Sec. 6 govern ongoing maintenance of the improvements. Cobblestone specifically waived any claim based on Art. V, Sec. 6 in the trial court. And we conclude that Art. IV, Sec. 3, the only provision on which Cobblestone relied, does not impose an ongoing maintenance provision and consequently will not support a claim of continuing breach.⁶

¶17 Cobblestone next contends that the rationale behind the statute of limitations does not support barring this action because the Moores' views were not impaired by the palm trees until 2005. But Cobblestone has abandoned its nuisance claim as well as its claim that the trees violated a CC&R provision preventing material interference with views. It has also conceded that it knew or reasonably should have known of the violation more than six years before filing this action. Thus, we fail to see how the alleged impairment of the Moores' views beginning in 2005 is relevant here.

⁶Therefore, we need not decide whether a maintenance provision would create a continuing duty and whether a cause of action would accrue with each successive breach of that duty. Additionally, we need not decide what accrual rule would apply to a covenant that requires performance of an act but provides no deadline for performance.

¶18 At oral argument, Cobblestone complained that this result is harsh. But it cited no authority that we may ignore either the contracting parties' intent or a statute of limitations if the result may be harsh. Indeed, the law provides otherwise. "[A] valid contract must be given full force and effect even if its enforcement is harsh." *G & S Invs. v. Belman*, 145 Ariz. 258, 268, 700 P.2d 1358, 1368 (App. 1984). And statutes of limitation by their very nature prevent a party from bringing an otherwise valid action and thus cause a harsh result. See *Landgraff v. Wagner*, 26 Ariz. App. 49, 53-54, 546 P.2d 26, 30-31 (1976) (noting discovery rule mitigates harsh result of statutes of limitation).

¶19 We conclude that Art. IV, Sec. 3 does not impose an ongoing duty and therefore accrual of Cobblestone's cause of action was not delayed by either the continuing violation or demand theories. In light of Cobblestone's concession that it knew or reasonably should have known of the breach more than six years before filing this action, the action was time-barred. Having waived any reliance on the CC&Rs' maintenance provision, Cobblestone cannot now indirectly assert a breach of the maintenance provision. Accordingly, the trial court did not err in granting the Greers' motion for summary judgment.

Conclusion

¶20 For the foregoing reasons, the judgment is affirmed. Because we conclude the court did not err in applying the statute of limitations, we need not address the Greers' arguments that Cobblestone lost the right to enforce the covenant by prescription or that the court erred in failing to apply various equitable defenses.

¶21 In accordance with a provision in the CC&Rs entitling the prevailing party to reasonable attorney fees, the Greers' request for reasonable attorney fees on appeal is granted, upon their compliance with Rule 21, Ariz. R. Civ. App. P. Because Cobblestone is not the prevailing party, its request for attorney fees is denied.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge